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Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

**NATIONAL WILDLIFE FEDERATION, et al.,**

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES SERVICE, et  
al.,**

Defendants,

Case No.: 3:01-CV-00640-SI

**JOINT STIPULATION AND  
~~PROPOSED~~ ORDER TO  
SETTLE PLAINTIFFS'  
SECOND APPLICATION  
FOR AN AWARD OF  
ATTORNEYS' FEES AND  
COSTS**

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This Stipulated Settlement Agreement (hereinafter, “Agreement”) is made between Plaintiffs, National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Trout Unlimited, Pacific Coast Federation of Fishermen’s Associations, Institute For Fisheries Resources, Idaho Rivers United, Idaho Steelhead And Salmon United, Northwest Sport Fishing Industry Association, Salmon For All, Columbia Riverkeeper, American Rivers, Inc., Federation of Fly Fishers, and NW Energy Coalition (collectively, “Plaintiffs”), and Federal Defendants, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the Bureau of Reclamation (collectively, “Federal Defendants”).

WHEREAS, on November 30, 2004, Federal Defendants filed a Notice of Release of Defendant NOAA Fisheries’ Final Biological Opinion on Remand (Dkt. 648);

WHEREAS, Plaintiffs filed a Second Supplemental Complaint for Declaratory and Injunctive Relief on December 30, 2004 (Dkt. 652) and a Third Supplemental Complaint for Declaratory and Injunctive Relief on March 21, 2005 (Dkt. 833);

WHEREAS, on May 26, 2005, the Court issued an opinion and order granting Plaintiffs’ Motion for Summary Judgment (Dkt. 986);

WHEREAS, on June 10, 2005, the Court issued an Opinion and Order re Motion for Preliminary Injunction (Dkt. 1015);

WHEREAS, on September 26, 2005, the Ninth Circuit in *NWF v. NMFS*, No. 05-35570 (9th Cir.), issued its Mandate affirming and remanding the District Court’s June 10, 2005 Opinion and Order (Dkt. 1080);

WHEREAS, on October 7, 2005, the Court issued an Opinion and Remand Order (Dkt. 1087);

WHEREAS, on December 29, 2005, the Court issued an Opinion and Order on Plaintiffs’ Motion for Further Injunctive Relief (Dkt. 1221);

WHEREAS, on May 5, 2008, Federal Defendants filed a Notice of Completion of Remand (Dkt. 1425);

WHEREAS, on June 4, 2008, Plaintiffs filed a second motion for attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the Endangered Species Act, 16 U.S.C. § 1540(g) (Dkt. 1427), and Plaintiffs and Federal Defendants concurrently stipulated to defer further briefing on that motion to allow for settlement discussions and conserve the parties resources (Dkt. 1428);

WHEREAS, on September 10, 2008, the Ninth Circuit in *NWF v. NMFS*, Nos. 06-35011, 06-35019 (9th Cir.), issued its Mandate on the appeal of the Court's May 26, 2005 Order (Dkt. 1487);

WHEREAS, on October 2, 2008, the Ninth Circuit granted Plaintiffs' motion to transfer consideration of its motion for fees and costs to the District Court;

WHEREAS, Plaintiffs have provided Federal Defendants with its contemporaneous time records and other information for their claim for attorneys' fees and costs, and counsel for Plaintiffs and Federal Defendants ("Parties") have engaged in good faith, confidential settlement negotiations concerning Plaintiffs' claims for attorneys' fees and costs;

WHEREAS, the Parties have reached an agreement as to an appropriate settlement of Plaintiffs' claims for fees and costs and agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve Plaintiffs' claims for fees and costs; and

WHEREAS, the Parties enter the Agreement below without any admission of fact or law, or waiver of any claims or defenses, factual or legal, except as specified in the Agreement;

NOW THEREFORE, in the interests of judicial economy and to avoid further litigation over Plaintiffs' claims for attorneys' fees and costs, Plaintiffs and Federal Defendants, for good and valuable consideration, the adequacy of which is hereby acknowledged, stipulate and agree as follows:

1. Subject to the provisions of Paragraph 4, below, Federal Defendants agree to settle all of Plaintiffs' claims for attorneys' fees and costs related to the challenge of NMFS's 2004 FCRPS Biological Opinion through May 5, 2008, and for any claims for fees and costs

incurred in the Ninth Circuit Court of Appeals through October 2, 2008, in the above-captioned litigation for a total amount of \$940,000.00.

2. Plaintiffs agree to accept payment of \$940,000.00 in the manner prescribed in Paragraph 3, below, in full satisfaction of any and all claims for attorneys' fees and costs through and including the date of May 5, 2008, and for any claims for fees and costs incurred in the Ninth Circuit Court of Appeals through and including October 2, 2008, that are related to the above-captioned litigation.

3. Federal Defendants agree to issue a check in the amount of \$940,000.00 or, as appropriate, make a wire transfer of the specified amount to: Earthjustice, 705 Second Avenue, Suite 203, Seattle, WA 98104. Federal Defendants agree to submit all necessary paperwork to funding authorities at the Department of Treasury within thirty (30) business days of receipt of the signed court order approving this Stipulation.

4. This Agreement does not apply to any claims for fees and costs that may arise from work after May 5, 2008, in the District Court, or after October 2, 2008, in the Ninth Circuit Court of Appeals, if any, in the above-captioned litigation. The Parties agree that should Plaintiffs seek fees and costs for work in this case after these dates, this Agreement is without prejudice to Plaintiffs' right to seek such fees and costs and likewise is without prejudice to the right of the Federal Defendants to oppose such a request on any basis other than the existence of this Agreement. Federal Defendants reserve all arguments and defenses with respect to any such future fee application.

5. This Agreement shall apply to and be binding upon the Parties, their members, delegates, and assigns. The undersigned representatives of the Parties certify that they are fully authorized to enter into the terms and conditions of this Agreement and to legally bind the Parties to it. Plaintiffs and their attorneys agree to hold Federal Defendants harmless in any litigation, further suit, or claim arising between Plaintiffs and their attorneys from the payment of the agreed-upon settlement amount pursuant to this Agreement.

6. This Agreement is executed solely for the purpose of compromising and settling Plaintiffs' claims for attorneys' fees and costs in the above-captioned case. Nothing in this Agreement shall constitute, or be construed to constitute, a precedent in any other context. Nothing in this Agreement shall be cited in any other litigation except as necessary to enforce the terms of the Agreement. By this Agreement, Federal Defendants do not waive any right to contest fees or costs claimed by Plaintiffs or Plaintiffs' counsel in any future litigation, and Plaintiffs do not waive any right to claim such fees or costs in any future litigation.

7. Any obligations of the United States to expend funds under this Agreement are subject to the availability of appropriations in accordance with the Anti-Deficiency Act, 31 U.S.C. § 1341. This Agreement shall not be construed to require the United States to obligate or pay funds in contravention of said Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

8. This Agreement represents the entirety of the Parties' commitments with regard to settlement of attorneys' fees and costs in the above-captioned case. The terms of this Agreement shall become effective upon approval by this Court of this Agreement.

9. In an electronic mail dated March 16, 2012, counsel for Plaintiffs, Stephen Mashuda, authorized Michael R. Eitel, counsel for Federal Defendants, to sign this joint stipulation and enter it in the CM/ECF system.

IT IS SO STIPULATED.

Dated this 16th day of March, 2012.

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/s/ Michael R. Eitel

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Attorneys for Federal Defendants

Dated this 16th day of March, 2012.

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Attorneys for Plaintiffs

## **ORDER**

The Court hereby approves and orders each and every term of this Stipulated Settlement Agreement. IT IS SO ORDERED.

Dated this 19<sup>th</sup> day of March, 2012.

/s/ Michael H. Simon  
The Honorable Michael H. Simon  
United States District Court Judge

**CERTIFICATE OF SERVICE**

I certify that on March 12, 2012, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

Dr. Howard F. Horton, Ph.D.  
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/s/ Michael R. Eitel